FILE COPY

FILED
FEB 24 1947
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1946.

No. 1051

HEALTH-MOR, INC., A CORPORATION,
Petitioner,

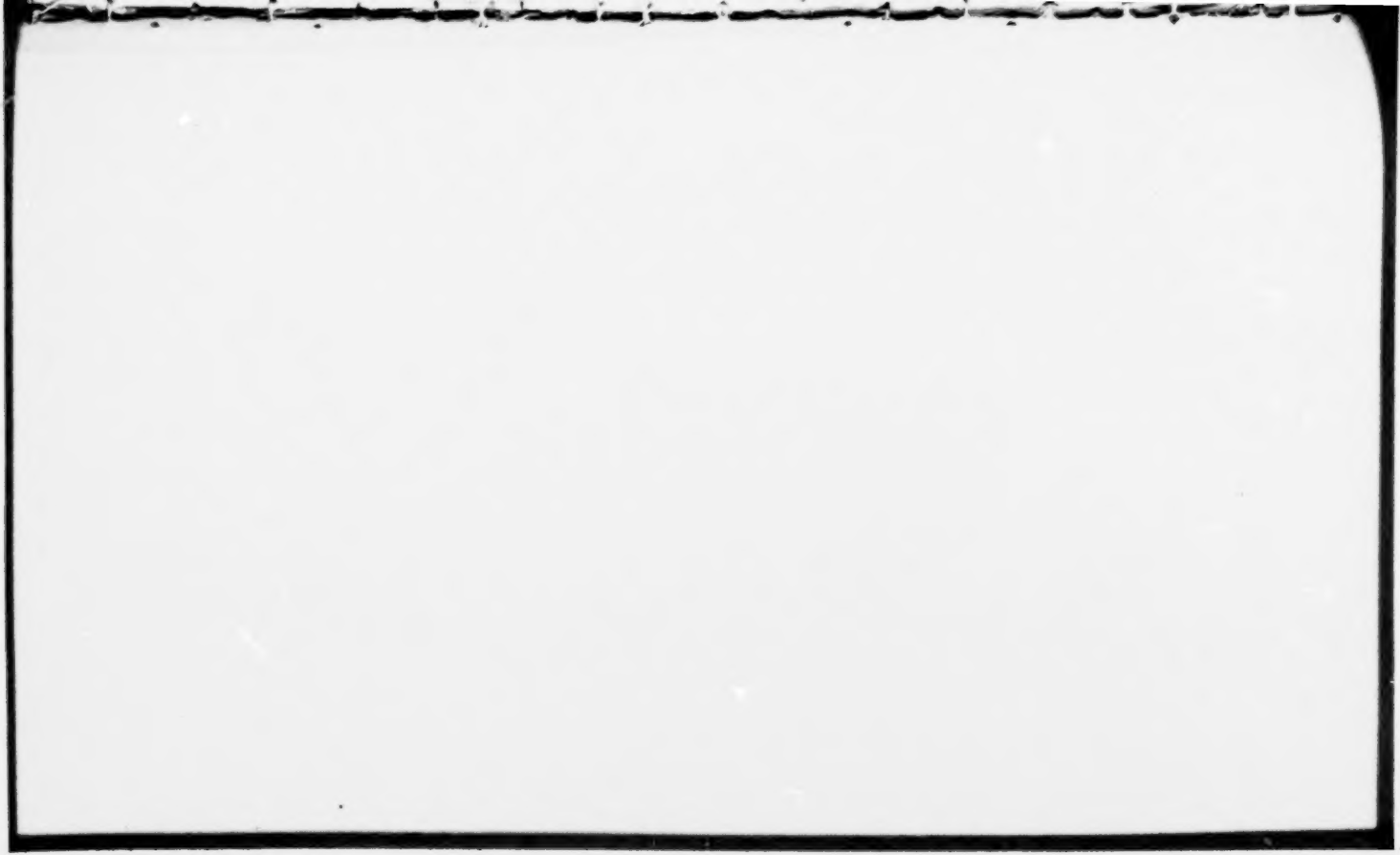
vs.

PAUL A. PORTER, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

ARTHUR ABRAHAM,
WALTER A. WADE,
Counsel for Petitioner.

THE BUNTHORP-WARREN PRINTING COMPANY, 210 WEST JACKSON, CHICAGO



INDEX.

PAGE

Petition:

Summary and Statement of Matter Involved.... 1
Jurisdiction 4
Questions Presented 4
Reasons for Granting the Writ..... 5

Brief:

Opinions of Court Below..... 7
Specifications of Assigned Errors..... 8
Argument 10

I. The courts below erred in finding that the parties were not entitled to a hearing upon the issue of relevancy and materiality and to an opportunity to demonstrate by evidence that actually the documents sought to be produced were neither relevant nor material to any legitimate inquiry on the part of the Price Administrator..... 10

A. An order requiring compliance with a subpoena issued by an administrative agency is final and appealable..... 10

B. The records required to be produced were the private records of Health-Mor, Inc. and American National Bank and Trust Company of Chicago and not records required to be kept by the Emergency Price Control Act of 1942. (R. 37, 52) 11

C. Administrative subpoenas will be enforced by the courts only when the documents and records sought to be produced are relevant and material to a legitimate

inquiry instituted by a governmental agency 12

D. The records and documents sought to be produced were not relevant or material to any investigation instituted by the Price Administrator 15

E. The trial court refused to permit the parties to introduce evidence to show (a) that actually there was no investigation being instituted by the Price Administrator; (b) that the documents and records sought to be produced were not relevant or material to any legitimate inquiry instituted by the Price Administrator. The court refused any hearing whatsoever to the parties upon the issues of relevancy or materiality. (R. 65).... 20

II. Health-Mor, Inc., was entitled to intervention of right in the proceeding..... 21

A. Health-Mor, Inc. has a definite legal property interest in the information sought to be elicited by the Price Administrator 21

B. The representation of the interest of Health-Mor, Inc. by the original respondents is or may be inadequate.... 23

C. Health-Mor, Inc. should have been permitted to intervene because it is bound by the judgment of the trial court entered September 11, 1946, requiring the divulging of the secret trade information and lists of customers of Health-Mor, Inc. 24

Conclusion 26

CASES CITED.

Bausch & Lomb Optical Co. v. Wahlgren, 1 Fed. Supp. 799, 801 22

Board of Trade v. Christie Grain & Stock Co., 198 U. S. 236, 250 (affirming C. C. A. 7) 6, 22

Bowles v. Cherokee Textile Mills, 61 Fed. Supp. 584.. 14

Bowles v. Beatrice Creamery Co., 146 Fed. 2nd 774, 779 (C. C. A. Tenth, 1944) 5, 14, 15

Clark v. Linderman, 88 Fed. 2nd 59..... 24

Clarke v. Federal Trade Commission, 128 Fed. 2nd 542, 543 11

Cobbledick v. United States, 309 U. S. 323, 329..... 10

Credits Commutation Co. v. United States, 177 U. S. 311, 315 ..... 6, 24

Davis v. United States, 90 L. Ed. 1156, (66 Sup. Court Reports 1256) 1159 11

Ellis v. Interstate Commerce Commission, 237 U. S. 434, 442 10

Federal Trade Commission v. American Tobacco Co., 264 U. S. 298..... 5, 12

Jones v. Securities and Exchange Commission, 298 U. S. 1 ..... 5, 12

McGarry v. Securities and Exchange Commission, 147 Fed. 2nd 389 (C. C. A. 10th, Feb. 7, 1945)..... 5

Myers v. Bethlehem Corp., 303 U. S. 41..... 24

Oklahoma Press Publishing Co. v. Walling, 327 U. S. 186 ..... 5, 13

Penfield Company of California v. Securities and Exchange Commission, 143 Fed. 2nd 746..... 10

State of Washington v. United States, 87 Fed. 2nd 421 (C. C. A. 9th, Dec. 18, 1936)..... 5, 25

Union Switch & Signal Co. v. Sperry, 169 Fed. 926... 22
United States v. California Canneries, 279 U. S. 553, 556 ..... 6, 25
Wilson v. United States, 221 U. S. 361, 380..... 11
Witkowsky v. Affeld, 283 Ill. 557, 576..... 22
Wolpe v. Paretsky, 144 Fed. 2nd 505 (U. S. C. A. District of Columbia, 1944, certiorari denied Nov. 20, 1944, 323 U. S. 777)..... 5, 23
2 Moore Federal Practice, page 2325..... 24

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. .....

HEALTH-MOR, INC., A CORPORATION,

Petitioner,

vs.

PAUL A. PORTER, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Health-Mor, Inc., a corporation, submits this Petition for a Writ of Certiorari to review an order of the United States Circuit Court of Appeals for the Seventh Circuit entered November 27, 1946, dismissing the appeal of your Petitioner from an order of the United States District Court for the Northern District of Illinois, Eastern Division, entered September 11, 1946.

I.

Summary and Short Statement of the Matter Involved.

The Administrator of the Office of Price Administration filed an Application in the District Court against American National Bank and Trust Company of Chicago and certain of its officers in purported pursuance of Section 202 of the Emergency Price Control Act, as amended, to compel the production of certain negotiable instruments payable to Health-Mor, Inc. and endorsed by it to the bank, certain completion certificates, correspondence in connection therewith, and office control records in connection therewith. (R. 1-12.)

The Respondents to the Application filed an Answer in opposition to the application. (R. 32-45.) Health-Mor, Inc. made a timely motion for leave to intervene (R. 45-47) and filed with said motion in accordance with Rule 24 of the Rules of Civil Procedure an answer setting forth the defense for which intervention was sought. (R. 47-54.)

The Application contained a general statement that the records were deemed by the Administrator to be relevant and material to the procuring of information which the Administrator deems proper and necessary to assist him in enforcing the Emergency Price Control Act of 1942 and the Price Control Extension Act of 1946, and the Orders and Regulations issued thereunder, relating to the purchase and sale of combination storm sashes and screens. (R. 13.) The Application contained no specific allegations as to the purpose for which the records were sought and no specific allegations as to their relevancy or materiality.

The Answer of American National Bank and Trust Company of Chicago, a corporation, Lawrence S. Stern and Kenneth R. Wells and the proposed Answer of Health-Mor, Inc., accompanying its Motion for Intervention, alleged that

"the records sought to be produced by virtue of said Inspection Requirement, Subpoena and Application were the private records of American National Bank and Trust Company of Chicago and of Health-Mor, Inc." (R. 37, 52.) Both Answers averred that it did not appear (a) from the Inspection Requirement, (b) from the Subpoena, or (c) from the Application filed, that any of the documents sought to be produced were in any way relevant, material or pertinent to assist the Price Administrator in the administration or enforcement of the Emergency Price Control Act of 1942, as amended, or the Price Control Extension Act of 1946, or any orders or regulations issued thereunder, and that in fact the records sought to be introduced were in no way material, pertinent or relevant to such purpose. (R. 39, 53.)

No reply was filed to these answers.

At the hearing there was some colloquy before the Court. No evidence was introduced. (R. 54-70.) The Court denied the motion of your petitioner for leave to intervene and entered the Order requiring production of the documents sought in the Application, but struck out the proposed finding of materiality and relevancy. (R. 64-65.) The Court refused to permit the Applicant to introduce testimony to show that there was actually no investigation by the Administrator of the character referred to in the Inspection Requirement and the Application, and that the documents sought to be produced were actually irrelevant and immaterial to any legitimate inquiry on the part of the Administrator. (R. 65.)

The District Court entered an Order on September 11, 1946, denying the motion of Health-Mor, Inc. for leave to intervene and requiring the production of the documents sought by the Price Administrator. (R. 71-72.) From this Order Health-Mor, Inc. took an appeal to the Circuit Court of Appeals for the Seventh Circuit. (R. 73.) The

appeal was dismissed on the motion of the Price Administrator. (R. 116.)

The question involved herein is: Did the District Court err in denying the motion of the petitioner for the right to intervene?

II.

Jurisdiction.

The jurisdiction of this court to review the Orders in question is conferred by Section 240 (a) of the Judicial Code of March 3, 1911, as amended by the Act of February 13, 1925, Title 28 U. S. C. A. Section 347, and by Section 262 of the Judicial Code of March 3, 1911, Title 28, U. S. C. A., Section 377. The Order of the Circuit Court of Appeals was entered November 27, 1946. (R. 116.)

III.

The Questions Presented Are as Follows:

1. Whether or not upon an Application by the Price Administrator for the production of documents under Section 202 of the Emergency Price Control Act, the owner of the information sought to be produced is entitled to be heard upon the issue of relevancy and materiality, or whether the mere assertion in the form of a general conclusion by the Price Administrator that such documents are deemed by him relevant and material is conclusive upon the parties and upon the courts?

2. Whether the owner of the trade information and trade secrets is entitled to intervene and be heard upon the issue of relevancy and materiality despite the circumstance that the physical possession of the documents sought to be produced is in the hands of its banker?

IV.

Reasons Relied on for the Allowance of the Writ.

1. The decision of the Circuit Court of Appeals for the Seventh Circuit, in this case, was in conflict with the decision of other Circuit Courts of Appeal on the same matter.

a. On the question as to whether or not the owner of the information sought to be produced is entitled to a hearing upon the issue of relevancy or materiality, or whether the determination of the Price Administrator as to relevancy and materiality is conclusive, the decision of the Circuit Court of Appeals in this case is in conflict with the following decisions:

Bowles v. *Beatrice Creamery Co.*, 146 Fed. 2d 774, 779 (C. C. A. Tenth, 1944);

McGarry v. *Securities and Exchange Commission*, 147 Fed. 2d 389 (C. C. A. 10th, Feb. 7, 1945).

b. Upon the question as to the right of Health-Mor, Inc. to intervene, the decision is in conflict with the following decisions:

Wolpe v. *Poretsky*, 144 Fed. 2d 505 (U. S. C. A. District of Columbia, 1944, Certiorari denied November 20, 1944, 323 U. S. 777);

State of Washington v. *United States*, 87 Fed. 2d 421 (C. C. A. Ninth, Dec. 18, 1936).

The decision of the Circuit Court of Appeals in this case is in conflict with the applicable decisions of the Supreme Court of the United States;

a. As to the right to be heard upon the issue of relevancy and materiality, the decision of the Circuit Court of Appeals in this case is in conflict with:

Jones v. *Securities and Exchange Commission*, 298 U. S. 1;

Federal Trade Commission v. *American Tobacco Co.*, 264 U. S. 298;

Oklahoma Press Publishing Co. v. *Walling*, 327 U. S. 186.

b. Upon the issue of the right of Health-Mor, Inc., to intervene, the decision of the Circuit Court of Appeals in this case is in conflict with the following decisions of this Court:

Board of Trade v. *Christie Grain & Stock Co.*, 198 U. S. 236, 250 (Affirming CCA 7);

United States v. *California Canneries*, 279 U. S. 553, 556;

Credits Commutation Co. v. *United States*, 177 U. S. 311, 315.

3. While the decision of the Circuit Court of Appeals for the Seventh Circuit is in clear conflict with the cases cited above, the precise questions presented have not been settled by the Supreme Court. They are questions of the greatest importance constantly recurring in the District Courts throughout the United States. They should be conclusively determined by this Court.

WHEREFORE, Petitioner prays that this Petition for a Writ of Certiorari may be granted and that this Court proceed as is provided by law and the rules of this court in such cases, and that upon final hearing, the Order of the United States Circuit Court of Appeals be reversed.

Respectfully submitted,

ARTHUR ABRAHAM,
WALTER A. WADE,
Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. .....

HEALTH-MOR, INC., A CORPORATION,

Petitioner,

vs.

PAUL A. PORTER, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions of Courts Below.

No written opinion was rendered by the District Court. The opinion of the Circuit Court of Appeals for the Seventh Circuit has not been reported. It was a memorandum opinion dismissing the appeal and appears in full in the record. (R. 116.)

II.

Statement of the Case.

A statement of the case having been made in the Petition for a Writ of Certiorari, it is omitted here for the sake of brevity.

III.

Specifications of Assigned Errors.

The Circuit Court of Appeals erred by the dismissal of the appeal in:

1. Finding that Health-Mor, Inc., was not entitled as a matter of right to intervene in the proceedings in the District Court.

2. Affirming the Order of the District Court denying the motion of Health-Mor, Inc., to intervene in said proceedings.

3. Affirming the order of the District Court entered September 11, 1946, requiring the production of certain documents.

4. Finding that the determination of the Price Administrator was conclusive upon the issue as to whether or not the documents sought to be produced were relevant and material.

5. Finding that the parties were not entitled to a hearing upon the issue of relevancy and materiality and were not entitled to show by evidence that actually the documents sought to be produced were not relevant or material.

6. Finding that the parties were not entitled to introduce evidence to show that in fact there was no investigation or inquiry instituted by the Price Administrator in

connection with which the documents sought to be produced could be relevant or material.

7. Finding that the documents sought to be produced were relevant or material to any legitimate inquiry on the part of the Price Administrator.

8. Failing to find that the documents sought to be produced were not relevant or material to any legitimate inquiry or investigation on the part of the Price Administrator.

9. Affirming the order of the District Court entered September 11, 1946.

ARGUMENT.

I.

The Courts Below Erred in Finding That the Parties Were Not Entitled to a Hearing Upon the Issue of Relevancy and Materiality and to an Opportunity to Demonstrate by Evidence That Actually the Documents Sought to Be Produced Were Neither Relevant Nor Material to Any Legitimate Inquiry on the Part of the Price Administrator.

A. An order requiring compliance with a subpoena issued by an administrative agency is final and appealable.

The precise point was decided in the case of *Ellis* v. *Interstate Commerce Commission,* 237 U. S. 434, where Mr. Justice Holmes in the opinion of the court said at page 442:

> "This is an appeal from an order of the District Court made upon a petition of the appellee, the Interstate Commerce Commission, filed under the act to regulate commerce, Section 12, c. 104, 24 Stat. 579, 583. The order directs the appellant to answer certain questions propounded and to produce certain documents called for by the appellee. There is no doubt that this appeal lies. The order is not like one made to a witness before an examiner or on the stand in the course of a proceeding *inter alios* in court. *Alexander* v. *United States,* 201 U. S. 117. It is the end of a proceeding begun against the witness. *Interstate Commerce Commission* v. *Baird,* 194 U. S. 25."

The doctrine of this case was reaffirmed in *Cobbledick* v. *United States,* 309 U. S. 323, at page 329.

To the same effect are *Penfield Company of California* v. *Securities and Exchange Commission,* 143 Fed. 2d 746

(CCA 9, 1944) at pages 748 and 749; and *Clarke* v. *Federal Trade Commission,* 128 Fed. 2d 542 (CCA 9, 1942), at page 543.

B. The records required to be produced were the private records of Health-Mor, Inc. and American National Bank and Trust Company of Chicago and not records required to be kept by the Emergency Price Control Act of 1942. (R. 37, 52.)

The records sought to be produced involved private transactions between Health-Mor, Inc., and the Bank. They were not pricing records. They were not records required to be kept under the Emergency Price Control Act of 1942 or any regulation of the Administrator. No presumption of relevancy may be assumed concerning records which are the purely private records of the parties.

The distinction between private papers and public documents is adverted to in the recent case of *Davis* v. *United States,* 90 L. Ed. 1156, 66 Supp. Court Reports 1256, affirming 151 Fed. 2d 140, where the court at page 1159 says:

> "We do not stop to review all of our decisions which define the scope of 'reasonable' searches and seizures. For they have largely developed out of cases involving the search and seizure of *private* papers. We are dealing here not with *private* papers or documents, but with gasoline ration coupons which never became the private property of the holder but remained at all times the property of the government and subject to inspection and recall by it.
>
> * * * * *
>
> "We are thus dealing not with *private* papers or documents but with *public* property in the custody of a citizen. The distinction between the two classes of property in the law of searches and seizures was recognized in *Wilson* v. *United States,* 221 U. S. 361, 380, 55 L. Ed. 771, 779, 31 S. Ct. 538, Ann. Cas. 1912d 558."

C. Administrative subpoenas will be enforced by the courts only when the documents and records sought to be produced are relevant and material to a legitimate inquiry instituted by a governmental agency.

In the case of *Jones* v. *Securities and Exchange Commission*, 298 U. S. 1, the Commission instituted an investigation upon a registration statement and served a subpoena on the registrant to appear before the Commission and bring certain books and papers. Thereafter, registrant gave formal notice that his statement was withdrawn. The Commission, however, persisted in the investigation and obtained an order enforcing compliance with the subpoena from the District Court. On appeal the Supreme Court held that the subpoena could not be enforced because the registrant's statement had been withdrawn. The Court says, at page 26:

> "The citizen, when interrogated about his private affairs, has a right before answering to know why the inquiry is made; and if the purpose disclosed is not a legitimate one, he may not be compelled to answer."

The Court further said at page 27, adopting with approval an opinion of Judge Sawyer in another case:

> " 'A general, roving, offensive, inquisitorial, compulsory investigation, conducted by a commission without any allegations, upon no fixed principles, and governed by no rules of law, or of evidence, and no restrictions except its own will, or caprice, is unknown to our constitution and laws; and such an inquisition would be destructive of the rights of the citizen, and an intolerable tyranny. Let the power once be established, and there is no knowing, where the practice under it would end.' "

In the case of *Federal Trade Commission* v. *American Tobacco Co.* 264 U. S. 298, the Court affirmed judgments

of the District Court denying petitions for Writs of Mandamus brought by the Attorney General to compel disclosure of their records by the defendants to the Federal Trade Commission.

The Court says, at pages 305 and 306:

> "Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire (*Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 479), and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime." • • • "• • • A general subpoena in the form of these petitions would be bad. Some evidence of the materiality of the papers demanded must be produced;"

The recent case of *Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186, clearly recognizes that in order for an administrative subpoena to be enforceable, the documents sought to be produced must be relevant to a legitimate inquiry by the agency issuing the subpoena. The Court says, at page 213:

> "In these results under the later as well as the earlier decisions, the basic compromise has been worked out in a manner to secure the public interest and at the same time to guard the private ones affected against the only abuses from which protection rightfully may be claimed. The latter are not identical with those protected against invasion by actual search and seizure, nor are the threatened abuses the same. They are rather the interests of men to be free from officious intermeddling, whether *because irrelevant to any lawful purpose* or because unauthorized by law, concerning matters which on proper occasion and within lawfully conferred authority of broad limits are subject to public examination in public interest. Officious examination can be expensive, so much so that it eats up men's substance. It

can be time consuming, clogging the processes of business. It can become persecution when carried beyond reason." (Emphasis added.)

The court says further at page 217:

"The Administrator is authorized to enter and inspect, but the Act makes his right to do so subject in all cases to judicial supervision. Persons from whom he seeks relevant information are not required to submit to his demand, if in any respect it is unreasonable or overreaches the authority Congress has given. To it they may make 'appropriate defense' surrounded by every safeguard of judicial restraint."

In the case of *Bowles* v. *Beatrice Creamery Co.*, 146 Fed. 2d 774 (CCA Tenth, December 29, 1944), the court said at page 779:

"There are cogent reasons why production and inspection should only be compelled by lawful process. Where the production is in response to lawful process, the owner of the books and papers is afforded protection by the limitations which the law imposes with respect to lawful process. Such process must state the subject of the inquiry, must particularly describe the books and papers so that they can be readily identified, *and must limit its requirements to books and papers that are relevant to the inquiry.* In other words, such process must confine its requirements within limits which reason imposes in the circumstances of the particular case. Moreover, the person to whom such process is addressed may challenge its legality before being compelled to respond thereto." (Emphasis added.)

In the case of *Bowles* v. *Cherokee Textile Mills*, 61 Fed. Supp. 584 (D. C. Bd Tenn. 1945), the Price Administrator contended that his determination of the materiality of the documents sought to be produced was conclusive upon the court. This contention was rejected by the court.

D. The records and documents sought to be produced were not relevant or material to any investigation instituted by the Price Administrator.

In the case of *Bowles* v. *Beatrice Creamery Co.*, 146 Fed. 2d 774, 779 (CCA Tenth, 1944), the Court states that "such *process* must state the subject of the inquiry, must particularly describe the books and papers so that they can be readily identified, and *must limit its requirements to books and papers that are relevant to the inquiry.*" (Emphasis added.)

This would appear to be the correct and reasonable rule since one served with a subpoena *duces tecum* should be able to determine from it or from the inspection requirement whether the records sought to be produced are material and relevant to any inquiry on the part of the Administrator. The general nature and character of the investigation and the relevancy of the documents sought to be produced should appear from the Inspection Requirement and the subpoena *duces tecum* so that the witness could determine the propriety and necessity of complying with the Inspection Requirement and the subpoena. The Administrator should inform the witness as to the general nature of the investigation and the relevancy of the records sought to be produced without making it necessary for the witness in each instance to compel an application to the Court to enforce the subpoena before the witness can obtain any information as to the nature of the investigation or the probable relevancy of the records sought.

In the case at bar neither the Inspection Requirement (R. 5-8) nor the subpoena *duces tecum* (R. 8-12) disclose any possible relevancy of the documents and records sought to be produced. Neither the Inspection Requirement nor the subpoena *duces tecum* contain an inkling as to the nature or character of the investigation except that

in the Inspection Requirement it is said to relate to the Administrator's enforcement of the Emergency Price Control Act and to Revised Maximum Price Regulation No. 251. (R. 5.) What the investigation is about, its nature, purpose, character, or extent are in no way revealed nor does it appear in any way how the records sought to be produced are believed to be material or relevant in any investigation.

It is utterly impossible from an examination of the Inspection Requirement or the subpoena *duces tecum to* determine the nature or character of the proposed investigation or to determine that the documents or records demanded have any relevancy whatever to such alleged investigation.

Nor does an examination of the Administrator's application (R. 1-5) enlighten us.

It must be observed at the outset that this application is not inartificially or ineptly prepared. It was prepared by very able counsel, specializing exclusively in work for the Administrator, and experienced in the preparation of such applications. Presumably, it states the best case for compliance with the Inspection Requirement and the subpoena *duces tecum* that the Administrator has, and presumably it sets out any purported relevancy of the documents sought to be produced as fully as the Administrator can or will state such relevancy. It was amended pursuant to Order of Court by the insertion of paragraph 15. (R. 13.) Yet it fails to disclose any possible relevancy of the documents and records sought to be produced.

The first two paragraphs advert to a pending proceeding instituted by the Administrator against Health-Mor, Inc., an Illinois corporation. (R. 1-2.) It is not suggested, however, that the purpose of the investigation is to aid or assist the Administrator in any way in the prosecution of

that proceeding. No allegation may be found in the application that the purpose is to attempt to discover other violations on the part of Health-Mor, Inc., in order to institute other proceedings. It is alleged in paragraph 4 of the application that the *definitions* contained in Revised Maximum Price Regulation No. 251 are important in the Administration and enforcement of the Emergency Price Control Act of 1942 and Price Control Extension Act of 1946. (R. 2.) There is no other clue in this application as to what the investigation or inquiry is about. Obviously, the records concerning the negotiation of negotiable instruments by Health-Mor, Inc. to American National Bank and Trust Company of Chicago could in no way assist the Administrator in the meaning of those definitions. Permit us to here point out that these definitions with which the Administrator is having difficulties are his own definitions. If he does not know the meaning thereof, how can the records and documents sought to be examined clarify such definitions? If the Administrator actually believes that he does not know what Revised Maximum Price Regulation 251 means, despite the circumstance that he is the author of it, presumably he could rewrite it so that it could be understandable, at least by the Office of Price Administration, if not by the citizens, counsel or courts.

The Application contains absolutely no information as to the nature or character of the investigation or inquiry on behalf of the Administrator. It contains no hint or clue as to the purpose of the Administrator in desiring to inspect negotiable instruments negotiated by Health-Mor, Inc. to the Bank or the records surrounding those transactions. There is not a clue in the applications as to how the documents or records could be relevant to any investigation on the part of the Administrator. The Administrator does not contend that the records sought to

be produced are price records. The Administrator does not contend that Health-Mor, Inc. did not keep its ordinary, usual and all price records as required by applicable regulations. The Administrator does not suggest that there has been any disposition on the part of Health-Mor, Inc. to refuse access to the Administrator to its price records kept, pursuant to the regulations.

There is not the slightest clue in the application as to the purpose, nature or character of the alleged investigation or inquiry instituted by the Administrator. That circumstance alone, would preclude any possibility as to showing relevancy or materiality. If the purpose, nature or character of the investigation or inquiry is to remain a secret, it obviously would be impossible to demonstrate the relevancy of the documents or records sought to be produced.

But there is no effort to show the relevancy or materiality of the documents or records sought to be produced. There is not a hint in the application as to how the documents or records sought to be produced could conceivably be material to any legitimate investigation or inquiry, on the part of the Administrator.

Obviously, the negotiation of negotiable instruments by Health-Mor, Inc. to the bank is not governed by any of the provisions of the Emergency Price Control Act; neither is it the subject matter of any regulation by the Administrator, nor could it be the subject matter of any regulation by the Administrator. If what the Administrator sought to inspect were price records of Health-Mor, Inc. required to be kept by Regulations promulgated under the Emergency Price Control Act, relevancy might perhaps be presumed, but that is not the situation here. These are not price records required to be kept by Health-Mor, Inc. They are the records of private transactions between Health-Mor, Inc. and the bank.

The Administrator is unable or has refused to disclose even the general purpose, nature or character of his inquiry or investigation. He is unable and has refused to state either in the Inspection Requirement, the subpoena *duces tecum*, or the Application any possible relevancy or materiality of the documents sought to be produced to any legitimate inquiry or investigation initiated by the Administrator.

Section 15 of the Application (R. 13) is simply a general conclusion in the language of the Statute, stating that the records are "deemed by the Administrator to be relevant and material". No facts of any kind are set out any place in the Application showing either the nature or character of the inquiry or how the records could be material.

The Answer of the original respondents and the Answer of Health-Mor, Inc. attached to its motion for Leave to Intervene, denies that the records sought to be produced are relevant or material to the administration or enforcement of the Emergency Price Control Act or any regulation issued thereunder. (R. 32, 53.)

The court did not find that the documents sought to be produced were relevant or material to the administration or enforcement of the Emergency Price Control Act. Instead, the Court struck out of the order prepared by counsel for the Administrator the finding of relevancy. (R. 65.) There was no testimony taken at any time during the proceedings.

E. The trial court refused to permit the parties to introduce evidence to show (a) that actually there was no investigation being instituted by the Price Administrator; (b) that the documents and records sought to be produced were not relevant or material to any legitimate inquiry instituted by the Price Administrator. The court refused any hearing whatsoever to the parties upon the issues of relevancy or materiality. (R. 65.)

We are confronted, accordingly, with the simple proposition of whether or not parties are required to surrender documents and records to the inspection of the Administrator upon his demand despite the circumstance that they may be utterly irrelevant and immaterial to any inquiry on the part of the Administrator. We are confronted with a situation in this case that the parties are required by the order of September 11, 1946, to produce private documents and records despite their irrelevancy and despite the circumstance that the parties were denied a hearing upon the issues of relevancy and materiality.

The order of the District Court is in direct contravention of the settled law.

No decided case in either the Supreme Court or the Circuit Court of Appeals goes to the extent of holding that the parties are not entitled to show that the documents and records sought to be produced are irrelevant and immaterial to any legitimate inquiry on the part of the Administrative Agency. On the contrary, every decision that we have been able to find recognizes the right of the parties to a hearing upon the issue of relevancy and materiality. The Order of the District Court and the Order of the Circuit Court of Appeals are in direct contravention of the settled law.

II.

Health-Mor, Inc., Was Entitled to Intervention of Right in the Proceeding.

A. Health-Mor, Inc. Has a Definite Legal Property Interest in the Information Sought to Be Elicited by the Price Administrator.

Health-Mor, Inc., desires a hearing to show to the Court that the records and documents sought to be produced are in no way relevant or material to any legitimate inquiry on the part of the Price Administrator. (R. 65.) That is why Health-Mor, Inc., sought to intervene. (R. 53.)

The argument of the Administrator in the court below was that even if the records and documents sought to be produced were irrelevant and immaterial, nevertheless, Health-Mor, Inc. has no legal interest sufficient to sustain an application to intervene as a matter of right. (R. 55.)

Intervention was sought under Rule 24 of the Rules of Civil Procedure. In connection with this argument it must be recalled that it stands admitted on the record that the documents sought to be produced are the documents of Health-Mor, Inc., as well as the documents of American National Bank and Trust Company of Chicago. (R. 37; 52.) The documents sought to be produced comprise negotiable instruments representing contracts entered into between Health-Mor, Inc., and those of its customers who purchased combination sash and screens on the time payment plan, since June 20, 1945, and other documents, correspondence and records relating to said instruments. What is sought to be produced is the name of all of the customers of Health-Mor, Inc., who bought on time payment since June 20, 1945, together with all of the details of the business of Health-Mor, Inc., relating thereto. (R. 9.)

It is well settled that Health-Mor, Inc. has a property interest in "trade information and list of customers". Its property interest will be protected by injunction. (*Bausch & Lomb Optical Co.* v. *Wahlgren,* 1 F. Supp. 799, 801; Affirmed 68 F. 2d 660; Certiorari denied 292 U. S. 639; Rehearing denied 292 U. S. 615.)

Information contained in "copies of reports, lists, diagrams, blueprints and photographs relating to plaintiff's business were held to be the subject of a property interest in *Union Switch & Signal Co.* v. *Sperry,* 169 Fed. 926 (C.C. S.D. N.Y.).

It is not the title to the documents which is sought to be protected. It is the information contained in the documents which constitutes trade information, and such constitutes a recognized type of property belonging to Health-Mor, Inc.

The circumstance that the information was confided to the American National Bank and Trust Company of Chicago by Health-Mor, Inc. in the course of customary confidential banking transactions in no way operates to deprive Health-Mor, Inc., of its property interest in such trade information.

In the case of *Board of Trade* v. *Christie Grain & Stock Co.*, 198 U. S. 236, 250, (Affirming CCA 7), the Court said:

> "* * * The plaintiff's collection of quotations is entitled to the protection of the law. It stands like a trade secret, * * *. The plaintiff does not lose its rights by communicating the results to persons, even if many, in confidential relation to itself, under a contract not to make it public. * * *"

In the case of *Witkowsky* v. *Affeld,* 283 Ill. 557, the court said, at Page 576:

> "Thus, any persons who in the capacity of agents have obtained the custody of the books and documents of their principals or have come into possession of

secrets relating to their affairs will be restrained from making them public, * * *."

There can be no doubt that Health-Mor, Inc., has a definite property interest in the trade information which is sought to be elicited by the Administrator. Health-Mor, Inc., is entitled to be heard upon the issues of relevancy and materiality.

B. The Representation of the Interest of Health-Mor, Inc. by the Original Respondents Is or May be Inadequate.

There is no legal representation of the interest of Health-Mor, Inc. because the original respondents are not technically trustees or fiduciaries for Health-Mor, Inc.

Assuming representation, however, it is obvious at this point that the representation is or may be inadequate.

In the case of *Wolpe* v. *Porstsky,* 144 Fed. 2d 505, (U. S. C. A. District of Columbia, 1944, Certiorari denied November 20, 1944, 323 U. S. 777), which arose after the Rules of Civil Procedure became effective, a suit was brought to enjoin the members of the Zoning Commission of the District of Columbia from carrying into effect a zoning order. Adjoining property owners sought to intervene upon the ground that if the order were set aside they would be seriously injured by the erection of an apartment house on the land rezoned by the commission. The court denied the motion to intervene. The order denying intervention was reversed by the Circuit Court of Appeals. The court said, at Page 508:

> "here at least one of the rights which cannot be protected without intervention is the right of appeal. The court was, therefore, in error in denying appellants leave to intervene as a matter of right."

When the Appeal of Health-Mor, Inc. was dismissed by the Circuit Court of Appeals for the Seventh Circuit, the

original respondents had not appealed from the order of the District Court entered September 11, 1946. On December 5, 1946, the original respondents American National Bank and Trust Company of Chicago, Lawrence S. Stern and Kenneth R. Wells, did file a Notice of Appeal from the Order of September 11, 1946. However, it is obvious that there is no legal representation of the interest of Health-Mor, Inc., by the original respondents. Health-Mor, Inc. is entitled to intervene and to be heard, itself, upon the issue of relevancy and materiality of the documents and evidence sought to be produced.

C. Health-Mor, Inc. should have been permitted to intervene because it is bound by the judgment of the trial court entered September 11, 1946, requiring the divulging of the secret trade information and lists of customers of Health-Mor, Inc.

Health-Mor, Inc. has no remedy whatsoever except intervention. A court has no jurisdiction to enjoin an Administrative proceeding as being contrary to law.

Myers v. *Bethlehem Corp.*, 303 U. S. 41.

Clark v. *Linderman & Halverson Co.*, 88 Fed. 2d 59.

Where there is no remedy save intervention, intervention is a matter of right.

"Rule 24 is based on the equity rule (37) and in large measure a restatement of the equity practice." 2 Moore Federal Practice, Page 2325.

The rule codifies the existing law upon this subject.

In the case of *Credits Commutation Co.* v. *United States*, 177 U. S. 311, the court says, at Page 315:

> "* * * cases may arise where the denial of a third party to intervene therein would be practical denial of certain relief to which the intervener is fairly en-

titled, and which he can only obtain by an intervention. * * * In such cases an order denying leave to intervene is not discretionary with the chancellor, and will generally furnish the basis for an appeal, since it finally disposes of the intervener's claim by denying him all right to relief."

This rule is recognized in the case of *United States* v. *California Canneries,* 279 U. S. 553, where the Court says, at Page 556:

> "* * * An order denying leave to intervene is not appealable, * * * except where he who seeks to intervene has a direct and immediate interest in a *res* which is the subject of the suit, * * *."

The rule is well stated in the case of *State of Washington* v. *United States,* 87 Fed. 2d 421 (C. C. A. Ninth, Dec. 18, 1936), where the court said at page 434:

> "However, it sometimes appears that the interveners have no remedy to litigate their question, except by intervening in an existing action or suit. In such cases, unless the interveners are permitted to litigate their questions in the pending litigation, their rights whatever they may be will be entirely lost, for they have no remedy by which such rights may be protected or adjudicated. An order denying such parties leave to intervene is, as this court stated in its first decision touching the question, 'a practical denial of all relief to the petitioner.' Therefore such an order is final and appealable."

It is obvious that Health-Mor, Inc. cannot obtain relief from an unreasonable search of the documents, books and records in question unless such relief be granted on intervention in the pending cause. It therefore follows that Health-Mor, Inc. was entitled to intervention as a matter of right, and that the trial court erred in overruling Appellant's action for leave to intervene.

Conclusion.

It is therefore respectfully submitted that for the reasons stated the Petition for Certiorari filed herein should be granted.

ARTHUR ABRAHAM,
WALTER A. WADE,
Counsel for the Petitioner.

FILE COPY

Office - Supreme Court, U. S.
FILED
MAR 17 1947
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 1051

HEALTH-MOR, INC., A CORPORATION,
Petitioner,

vs.

PAUL A. PORTER, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION,
Respondent.

OBJECTIONS TO MOTION TO SUBSTITUTE PHILIP B. FLEMING, TEMPORARY CONTROLS ADMINISTRATOR, AS RESPONDENT, AND BRIEF IN SUPPORT THEREOF.

ARTHUR ABRAHAM,
WALTER A. WADE,
Attorneys for Petitioner.

THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

INDEX.

PAGE

Objections to Motion for Substitution..... 1

Brief 2

Argument:

I. Executive Order 9809 Is in Contravention of Section 201 (B) of the Emergency Price Control Act of 1942..... 5

(a) It is not a transfer of functions "with respect to a particular commodity or commodities" 5

(b) Executive Order 9809 was not a transfer of the functions of the Price Administrator to a Department or Agency "having other functions relating to such commodity or commodities" 5

(c) Section 201 (a) of the Emergency Price Control Act requires the confirmation of a Price Administrator by the Senate..... 5

(d) Executive Order 9809 is in effect merely a repeal of the Emergency Price Control Act of 1942..... 6

II. Executive Order 9809 Is Not Authorized by Title I of the First War Powers Act of 1941.... 6

(a) The Emergency Price Control Act of 1942 removed the functions of the Price Administrator from the purview of the First War Powers Act which therefore has no application to the attempted transfer..... 7

(b) The transfer of those functions is not "a matter relating to the conduct of the present war"..... 8

(c) The President's authority to consolidate agencies and to transfer functions is limited to agencies in existence at the time the First War Powers Act was enacted and, therefore, that authority would not extend to functions of the Office of Price Administration which was subsequently created..... 10

(d) Section 4 of the First War Powers Act prohibits the abolition by the President of the Office of Price Administration..... 13

III. Executive Order 9809 Is in Contravention of Title XV of the Second War Powers Extension Act of 1946..... 14

IV. The Stabilization Act of 1942 Obviously Does Not Authorize Executive Order 9809..... 16

Cases Cited.

Bowles v. Willingham, 321 U. S. 503 5
Campbell v. Galeno Chemical Co., 281 U. S. 599 6
Durousseau v. U. S., 6 Cranch 308 8
Emery Bird Thayer Dry Goods Co. v. Williams, (C. C. A. 8, 1938) 98 F. (2d) 166, 172 12
Fleming v. Mohawk Wrecking & Lumber Co., No. 583 .. 4
International Railway Co. v. Davidson, 257 U. S. 506 .. 6
Jackson v. Chicago R. I. & P. Ry. Co., (1910) 178 Fed. 431 8
McKee v. U. S., 164 U. S. 287 8
Missouri v. Ross, (1936) 299 U. S. 72 8
Townsend v. Little, (1883) 109 U. S. 504 8
United States v. Daniels, (C. C. A. 2, 1922) 279 Fed. 844, 849 12
United States v. Eaton, 144 U. S. 677 6
United States v. Hess, (C. C. A. 8, 1934) 71 F. (2d) 78 8
Yakus v. U. S., 321 U. S. 414 5

Statutes Cited.

Emergency Price Control Act of 1942, U. S. C. A. Title 50, Appendix, Section 901, et seq. 5, 6, 21, 22
First War Powers Act 1941, U. S. C. A. Title 50 ..... 6, 7, 8, 10, 11, 22, 23
Second War Powers Extension Act of 1946, Title 15, U. S. C. A. Title 50, Appendix, Sec. 645(b) 14, 15
Stabilization Act of 1942, U. S. C. A. Title 50, Appendix, Sec. 961-971 16
Price Control Extension Act of 1946, U. S. C. A. Title 50, Appendix, Sec. 902, Sub-Sec. (b) 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 1051

HEALTH-MOR, INC., A CORPORATION,
Petitioner,

vs.

PAUL A. PORTER, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION,
Respondent.

OBJECTIONS TO MOTION TO SUBSTITUTE PHILIP B. FLEMING, TEMPORARY CONTROLS ADMINISTRATOR, AS RESPONDENT IN THE ABOVE ENTITLED CASE.

Health-Mor, Inc., a corporation, the Petitioner in the above entitled Petition for Certiorari, objects to the Motion for the substitution of Philip B. Fleming, Temporary Controls Administrator, as respondent in the above entitled cause upon the following grounds:

1. Philip B. Fleming, Temporary Controls Administrator, is not a successor in office to Paul A. Porter, Administrator, Office of Price Administration.

2. Executive Order 9809 issued by the President of the United States on December 12, 1946 is invalid and ineffective insofar as it attempts to vest in Philip B. Fleming,

Temporary Controls Administrator, the functions and powers of the Administrator of the Office of Price Administration.

A Brief in support of these objections is filed herewith.

.....

ARTHUR ABRAHAM,

.....

WALTER A. WADE,

Attorneys for Health-Mor, Inc., Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 1051

HEALTH-MOR, INC., A CORPORATION,
Petitioner,

vs.

PAUL A. PORTER, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION,
Respondent.

BRIEF IN SUPPORT OF OBJECTIONS TO MOTION TO SUBSTITUTE PHILIP B. FLEMING, TEMPORARY CONTROLS ADMINISTRATOR, AS RESPONDENT IN THE ABOVE ENTITLED CASE.

A motion for substitution in the above entitled cause must be based upon the contention that the Temporary Controls Administrator is a successor in office to the Price Administrator. (USCA Title 28, Sec. 780) (Appendix A of this Brief.)

By Executive Order 9809 (11 Fed. Reg. 14281) (See Appendix B of this Brief) the President purported to consolidate the Office of War Mobilization and Reconversion, the Office of Economic Stabilization, the Office of Price Administration, and the Civilian Production Administration to form one agency in the Office for Emergency Manage-

ment of the Executive Office of the President to be known as the Office of Temporary Controls. The functions of the Price Administrator were vested in the Temporary Controls Administrator.

Executive Order 9809 purported to be promulgated by virtue of the authority vested in the President by the Constitution and Statutes, including in Title I of the First War Powers Act of 1941 Title II of the Second War Powers Act, 1942, Section 201(B) of the Emergency Price Control Act, as amended, and Section 2 of the Stabilization Act of 1942.

The objectors contend that Executive Order 9809 was invalid and ineffective to vest the functions of the Price Administrator in the Temporary Controls Administrator for the reasons that:

1. Executive Order 9809 is in contravention of Section 201 (B) of the Emergency Price Control Act of 1942;

2. Executive Order 9809 is not authorized by Title I of the First War Powers Act of 1941;

3. Executive Order 9809 is in contravention of Title XV of the Second War Powers Extension Act of 1946; and

4. The Stabilization Act of 1942 does not authorize Executive Order 9809.

In the case of *Fleming* v. *Mohawk Wrecking & Lumber Co.*, No. 583 October Term 1946, pending in this Court, a motion was made to vacate an order substituting Philip B. Fleming, Temporary Controls Administrator, for Paul A. Porter, Price Administrator. This Court on January 6, 1947, ordered "Further consideration of the motion * * * postponed to the hearing of the case on the merits".

I.

Executive Order 9809 Is in Contravention of Section 201 (B) of the Emergency Price Control Act of 1942.

The Price Control Act was passed by Congress in the valid exercise of the War Powers delegated to Congress by the Constitution. (*Yakus* v. *U. S.* 321 U. S. 414; *Bowles* v. *Willingham,* 321 U. S. 503.)

Section 201 (a), (See Appendix C, of this Brief) provides that the administration of the Office of Price Administration shall be vested in a Price Administrator.

Section 201 (b) (See Appendix C of this Brief) covers completely the entire field of the functions of the Price Administrator. Executive Order 9809 is in obvious contravention of this provision since:

(a) It is not a transfer of functions "with respect to a particular commodity or commodities". Executive Order 9809 does not purport to limit the attempted transfer to functions "with respect to a particular commodity or commodities," but on the contrary purports to make a blanket transfer of all of the functions of the Price Administrator;

(b) Executive Order 9809 was not a transfer of the functions of the Price Administrator to a Department or Agency "having other functions relating to such commodity or commodities". Obviously, the Office of Temporary Controls was not a Department or Agency having other functions relating to such commodity or commodities. It had not existed prior to Executive Order 9809;

(c) Section 201 (d) of the Emergency Price Control Act requires the confirmation of a Price Administrator by the Senate. The Temporary Controls Administrator has never been confirmed by the Senate. The express provi-

sions of Section 201 (A) cannot be avoided by indirection as was attempted in Executive Order 9809. A construction that Executive Order 9809 is valid would render completely nugatory the requirement that the appointment of the Administrator must be confirmed by the Senate.

(d) Executive Order 9809 is in effect merely a repeal of the Emergency Price Control Act of 1942.

The transfer of the functions to the Office of Temporary Controls being unauthorized by the Emergency Price Control Act of 1942, the effect of Executive Order 9809 is simply to alter or repeal the express provisions of the Act by which Congress has directed that the functions of the Administration under the Act shall be vested in and exercised by the Price Administrator. Such an invasion of the sphere of legislative power specifically delegated to Congress by the Constitution would violate the fundamental constitutional principle of the separation of powers. *Campbell* v. *Galeno Chemical Co.*, 281 U. S. 599; *International Railway Co.* v. *Davidson*, 257 U. S. 506; *U. S.* v. *Eaton*, 144 U. S. 677.

II.

Executive Order 9809 Is Not Authorized By Title I of the First War Powers Act of 1941.

Title I of the First War Powers Act (50 USCA App. Section 601-602) (See Appendix D of this Brief) does not authorize the transfer by Executive Order 9809 of the Price Administrator's functions to the Temporary Controls Administrator because:

(a) The Emergency Price Control Act of 1942 removed the functions of the Price Administrator from the purview of the First War Powers Act, which therefore has no application to the attempted transfer;

(b) The transfer of those functions is not "a matter relating to the conduct of the present war"; and

(c) The President's authority to consolidate agencies and to transfer functions is limited to agencies in existence at the time the First War Powers Act was enacted and, therefore, that authority would not extend to functions of the Office of Price Administration which was subsequently created; and

(d) Section 4 of the First War Powers Act prohibits the abolition by the President of the Office of Price Administration.

A. The Price Control Act removed the functions of the Price Administrator from the purview of the First War Powers Act which therefore has no application to the attempted transfer.

The First War Powers Act contains a general grant of power to the President. But this grant of power by the Congress gave the President no vested right or authority which thereafter was beyond the reach of Congress. The broad power the Congress had given to the President in general terms in the First War Powers Act was subject to such exceptions, restrictions or limitations which Congress might provide in later statutes. Congress in the Price Control Act has specifically legislated on the subject of transfers of functions of the Price Administrator. Section 201(b) limits the President's power to transfer the Price Administrator's functions to the transfers enumerated in that section and excludes the power to make any transfers except those enumerated therein. In so doing Congress created a specific exception to the general powers granted in the First War Powers Act the effect of which is to limit and restrict those powers when applied to the Price Administrator's functions to transfers of his functions which are authorized by Section 201(b) of the

Price Control Act. It is familiar law that when broad general statutory powers apparently conflict with specific statutory provisions on the same subject the specific provisions will be given effect in accordance with their terms and will be interpreted as creating an exception to the general provisions. *Missouri* v. *Ross,* (1936) 299 U. S. 72, 81 L. Ed. 48; *McKee* v. *U. S.,* 164 U. S. 287, 41 L. Ed. 37; *Durousseau* v. *U. S.,* 6 Cranch 308, 3 L. Ed. 232; *Townsend* v. *Little,* (1883) 109 U. S. 504, 27 L. Ed. 1012; *U. S.* v. *Hess,* (C. C. A. 8, 1934) 71 F. (2d) 78; *Jackson* v. *Chi. R. I. & P. Ry. Co.,* (1910) 178 Fed. 431. This rule of construction is applicable even if the specific provisions are contained in a statute passed prior to the statute containing the general provisions. A *fortiori,* the rule has its strongest and most imperative application when as here, the specific provisions are contained in a statute passed subsequently to the one containing the general provisions.

B. The transfer of the functions of the Price Administrator was not authorized by the First War Powers Act because the transfer of those functions was not a matter "relating to the conduct of the present war."

The authority conferred upon the President by Title I of the First War Powers Act to redistribute the functions of executive agencies is expressly made subject to the following proviso:

> "That the authority by this title granted shall be exercised only in matters relating to the conduct of the present war."

The proviso is not a mere time limitation which is satisfied by any transfer accomplished within a prescribed time limit. Rather, it imposes a substantive requirement which must be met whenever the power to transfer functions is sought to be exercised, even during the existence

of actual hostilities. The phrase "conduct of the present war" has a transitive character which denotes the actual carrying on or prosecution of the war, the taking of affirmative action with respect to the war. Webster defines "conduct" as follows:

> "Act or manner of carrying on, directing, or managing, as a business management; direction. Christianity has humanized the *conduct* of war."

And "war" is defined as follows:

> "The state or fact of exerting violence or force against another, now only against a state or other politically organized body; especially a contest by force between two or more nations or states, carried on for any purpose; armed conflict of sovereign powers; declared and open hostilities." (Webster New International Dictionary, 2d Ed. Unabridged.)

Thus "conduct of the present war" means the carrying on or directing of an armed conflict between nations. Obviously the attempted transfer of the Price Administrator's functions was not a matter relating to the "conduct of the present war," for at the time the transfer was attempted those functions had ceased to have any relation whatever to the carrying on or directing of an armed conflict between nations.

While it is true, as we have pointed out above, that the proviso is a substantive requirement and not a mere time limitation, nevertheless the proposition that the transfer of the functions of the Price Administrator is not a matter relating to the conduct of the war is shown also by the lengthy period of time which has expired since this nation ceased carrying on the war. More than a year prior to December 12, 1946 the last of the countries with which the United States was carrying on armed conflict had surrendered unconditionally and since that time our armed forces have generally been demobilized.

C. The consolidation of the Office of Price Administration with other governmental agencies and the transfer of its functions to the O. T. C. is not authorized by Title I of the First War Powers Act because the OPA was not in existence at the time of the enactment of that statute.

The transfer, by Executive Order 9809, of the functions of the Price Administrator to the Administrator of the Office of Temporary Controls, and its consolidation and merger there with other governmental agencies is purportedly made by authority of Title I of the First War Powers Act of 1941.

Section 2 of that Act provides:

> "In carrying out the purposes of this title (sections 601-605 of this appendix) the President is authorized to *utilize, coordinate,* or *consolidate* any executive or administrative commission, bureaus, agencies, governmental corporations, offices or officer *now existing by law,* to transfer any duties or powers *from one existing* department, commission, bureau, agency, governmental corporation, office or officer thereof, or any part of it, either by detail or assignment, together with the whole or any part of the records and public property belonging thereto. Dec. 18, 1941, c. 593, Title I, § 2, 55 Stat. 838." (Italics added.)

A reading of the above section of the Act shows that Congress intended the power granted to the President to be limited (and did so limit it) to such executive or administrative commissions, bureaus, agencies, governmental corporations, offices, or officers as were in existence on December 18, 1941. Thus, by section 2, Congress circumscribed its grant of authority to the President to "utilize, coordinate, or consolidate any executive or administrative commission, etc." to those "now existing by law." That Executive Order 9809 is intended to fall under Section 2

of the First War Powers Act is patent from the express wording of Section 1 of the Order which states:

> "Except as otherwise provided in this order the following agencies and their functions are *consolidated* to form one agency * * *. (Italics ours.) ours.)

However, the President's attempt to consolidate the Office of Price Administration with other governmental agencies is sanctioned by Section 2 of the First War Powers Act only if the OPA was an agency existing by law on December 18, 1941, the date the First War Powers Act became law. That the President lacked the power to consolidate OPA with other agencies is demonstrated by the fact that OPA did not come into existence until January 30, 1942. Clearly then, the OPA was not an "executive or administrative commission, bureau, agency, governmental corporation, office or officer now existing by law" as of December 18, 1941. Hence, Section 2 of the First War Powers Act does not authorize the consolidation of OPA with other governmental agencies and the purported accomplishment of that result through Executive Order 9809 is ineffectual.

While Section 1 of the First War Powers Act gives the President the general power "* * * to make such redistribution of functions among executive agencies as he may deem necessary * * *" and while Section 2 speaks of a consolidation and the "transfer" of "duties or powers," nevertheless, these two sections embrace the same subject matter, *i. e.*, the authority of the President to redistribute or transfer functions, duties or powers among executive agencies. Obviously, there cannot be a "redistribution" without having a "transfer" of "duty," "power," or "function." It is apparent, therefore, that Section 1 and Section 2 are in harmony with each other only if Section 1 is interpreted as the broad, general grant of power, the ultimate boun-

daries of which are defined by the subsequent specific sections 602 through 605. Thus, Section 1 states, in effect, the purpose of Title I and the conditions under which the power granted may be exercised. The precise situations in which the power may be utilized and the nature of those powers are then defined by the succeeding sections of the title. Thus, Section 2 authorizes the President to "utilize, coordinate or consolidate" any executive or administrative agency then existing by law. It also gives him the authority to "transfer any duties or powers" from "one existing agency * * * to another," that being a component part of the entire parcel of power granted in the first part of Section 2. Section 4 then empowers and directs him, should he conclude that any bureau or office should be abolished, to report his conclusions to Congress with such recommendations as he deems proper. In final analysis, the Title gives the President three distinct powers, first, to "utilize, coordinate or consolidate" existing agencies, second, to transfer duties and powers among existing agencies, and, third, to report and recommend the abolition of agencies.

Such an interpretation of Sections 1-5 of Title I comports with accepted rules of statutory construction. *U. S.* v. *Daniels*, (C. C. A. 2, 1922), 279 Fed. 844, 849; *Emery Bird Thayer Dry Goods Co.* v. *Williams*, (C. C. A. 8, 1938), 98 F. (2d) 166, 172; Crawford on Statutory Construction, §166, §167.

Although Section 2 of Executive Order 9809 states in part, "Except as otherwise provided in this Order, the functions of * * * the Price Administrator * * * are vested in the Administrator" of Temporary Controls, yet it seems reasonable to assume that in using the word "vested" the President was only describing the process of "transfer." That transfer of functions purportedly was being accomplished through the medium of the Executive Order and that power to transfer functions was asserted, by the very

language of the order, to derive from Title I of the First War Powers Act. However, that attempted transfer is wholly invalid because Section 2 limits the power to transfer functions to existing agencies. Neither the Office of Price Administration nor the Office of Temporary Controls were existing agencies on the date of the passage of the First War Powers Act.

Nor does the power conferred upon the President by Section 1 of the First War Powers Act "to make such redistribution of functions among executive agencies as he may deem necessary" support the transfer sought to be made by Executive Order 9809. As pointed out already, the general authority granted therein is limited by the subsequent specific sections of the Title. To interpret Section 1 otherwise would make it conflict with the later specific sections.

D. Section 4 of the First War Powers Act prohibits the abolition of the Office of Price Administration by presidential action alone.

The President, in promulgating Executive Order 9809, has, in effect, abolished the Office of Price Administration. By that order, he purports to "consolidate" the OPA with other agencies in the Office of Temporary Controls, and to transfer all of the functions of the Price Administrator to the Administrator of O. T. C., thus eliminating the Office of Price Administration. Such a result is expressly forbidden by the language of Section 4 of the First War Powers Act, which provides [50 U. S. C. A. §604, War Appendix]:

> "§604 Presidential recommendation to Congress for elimination of certain bureaus, offices, etc.
>
> "Should the President, in redistributing the functions among the executive agencies as provided in this title conclude that any bureau should be abolished and it or their duties and functions conferred upon some other department or bureau or eliminated entirely, he

shall report his conclusions to Congress with such recommendations as he may deem proper. Dec. 18, 1941, c. 593, Title I, § 4, 55 Stat. 839."

This section of the Act is explicit in denying to the President the power to abolish a bureau. The extent of his power in this connection is limited to reporting his conclusions to Congress, together with such recommendations as he considers proper. However, the President has never complied with this statutory requirement by reporting to Congress that, in his judgment, the OPA should be abolished. Instead, he has circumvented this specific requirement by purporting to "consolidate" the Office of Price Administration and to "transfer" its functions to the Office of Temporary Controls.

III.

Executive Order 9809 Is in Contravention of Title XV of the Second War Powers Extension Act of 1946.

Title XV of the Second War Powers Extension Act of 1946 forbids a construction of the First War Powers Act permitting a transfer of the functions of the Price Administrator to a Temporary Controls Administrator.

The administration of the Emergency Price Control Act of 1942 as amended, by the Temporary Controls Administrator is expressly forbidden by Section 2, Title XV of the Second War Powers Act, (USCA Title 50, App. Sec. 645b, Mar. 27, 1942, c. 199 Title XV Sec. 1503 as added June 29, 1946, c. 526 Sec. 2, 60 Stat. 346).

Said Section reads as follows:

"Nothing contained in this Act *or any other Act* (except the Emergency Price Control Act of 1942, as amended, the Stabilization Act of 1942, as amended, or the District of Columbia Emergency Rent Act, approved December 2, 1941, as amended) shall be con-

strued to authorize the establishment by any officer or agency of the Government of maximum prices for any commodity or maximum rents for any housing accommodations." (Italics ours.)

The Emergency Price Control Act of 1942, as amended, (USCA Title 50 Appendix 901-946, Jan. 30, 1942 c. 26, 56 Stat. 23), provides in terms that the Office of Price Administration "shall be under the direction of a Price Administrator," and Section 202 of the Emergency Price Control Act of 1942, as amended, provides that only the Administrator may issue subpoenas or make application to the Court for obedience to such subpoenas. Executive Order No. 9809 purports to transfer the powers and functions of the Price Administrator to fix maximum prices for commodities to the Temporary Controls Administrator. The Temporary Controls Administrator purports to fix maximum prices for commodities and purports to administer the Emergency Price Control Act of 1942, as amended, under Executive Order No. 9809.

In so acting, the Temporary Controls Administrator acts without authority of law and in express contravention of Section 2 Title XV of the Second War Powers Act. That which is sought to be accomplished by Executive Order No. 9809 is expressly forbidden by said Statute as amended and hereinabove quoted.

We submit that this clear and express provision of the Second War Powers Act as amended finally disposes of any argument that the general language of Section 1 Title I of the First War Powers Act authorizes Executive Order No. 9809.

IV.

The Stabilization Act of 1942 Obviously Does Not Authorize Executive Order 9809.

Section 2 of the Stabilization Act of 1942 (USCA Tit. 50 App. Sec. 962) is apparently referred to in Executive Order 9809 as the basis for consolidating the Office of Economic Stabilization into the new agency, Office of Temporary Controls. This section authorizes the President to exercise any power or authority conferred upon him by the Act through such department, agency or officer as he shall direct. It further provides that he may suspend certain provisions of the Emergency Price Control Act, but that "he may not, under the authority of this Act, suspend any other law or part thereof." Obviously, this section does not authorize him to transfer the powers and functions of the Price Administrator to the new agency created by Executive Order 9809.

Attention is directed to Section 1A of the Price Control Extension Act of July 25, 1946. Subparagraph (c) (2) provides:

> "(2) On or before April 1, 1947, the President shall report to the Congress what, if any commodities or classes of commodities, including housing accommodations, are in such critically short supply as to necessitate, in his judgment, the continuance of the powers granted by this Act as to them after June 30, 1947, together with his recommendations as to establish departments or agencies of the Government (other than the Office of Price Administration) which should be charged with the administration of such powers."

It is clear from this language in the Price Control Extension Act that Congress intended that Congress itself, and not the President, should determine whether the powers and functions of the Office of Price Administration were to be transferred to other agencies, and, if so, to what agencies.

Congress intended that the President report to Congress, and that it, the Congress, would then decide whether to adopt the President's recommendation or would determine what established departments or agencies of the Government, if any, should be charged with the future administration of the powers and functions conferred upon the Office of Price Administration by the Emergency Price Control Act of 1942, as amended. To date the President has not made the report to Congress required under the Price Control Extension Act. The purported transfer of the powers and functions of the Price Administrator to the Temporary Controls Administrator has not been approved by the Congress.

If Congress had intended to authorize the President to discontinue the administration of the Office of Price Administration by a Price Administrator, and to transfer all of the powers and functions conferred upon the Price Administrator under the provisions of the Emergency Price Control Act of 1942, as amended, to an entirely new and distinct agency not created by Congress or by any specific law, the Price Control Extension Act of 1946, would have contained clear and unequivocal language granting such authority. On the contrary, it specifically requires the President to report to the Congress his recommendations as to such a transfer with the intention that it, the Congress, would then determine what transfer of powers would be made, and to what agency, bureau or department.

Conclusion.

It is respectfully submitted that the Motion to Substitute the Temporary Controls Administrator as Respondent in the above entitled cause should be denied for the reasons above stated.

.....

ARTHUR ABRAHAM,

.....

WALTER A. WADE,
Attorneys for Petitioner.

APPENDIX A.

USCA Title 28, Section 780(a):

"§ 780. Survival of actions, suits or proceedings—

"(a) By or against officer of United States, District of Columbia, Canal Zone, or territory or insular possession of United States, or of country, and so forth, of such territory or insular possession. Where, during the pendency of an action, suit, or other proceeding brought by or against an officer of the United States, or of the District of Columbia, or the Canal Zone, or of a territory or an insular possession of the United States, or of a county, city, or other governmental agency of such territory or insular possession, and relating to the present or future discharge of his official duties, such officer, dies, resigns, or otherwise ceases to hold such office, it shall be competent for the court wherein the action, suit or proceeding is pending, whether the court be one of first instance or an appellate tribunal, to permit the cause to be continued and maintained by or against the successor in office of such officer, if within six months after his death or separation from the office it be satisfactorily shown to the court that there is a substantial need for so continuing and maintaining the cause and obtaining an adjudication of the questions involved."

APPENDIX B.

Executive Order 9809, 11 Fed. Reg. 14281, Promulgated December 12, 1946:

"*Providing for the Disposition of Certain War Agencies*

By virtue of the authority vested in me by the Constitution and Statutes, including Title 1 of the First War Powers Act, 1941, Title III of the Second War

Powers Act, 1942, Section 201 (B) of the Emergency Price Control Act of 1942, as amended, and section 2 of the Stabilization Act of 1942, and as President of the United States, it is hereby ordered, for the purpose of further effectuating the transition from war to peace and in the interest of the internal management of the government, as follows:

1. Except as otherwise provided in this order, the following agencies and their functions are consolidated to form one agency in the Office for Emergency Management of the Executive Office of the President, which shall be known as the Office of Temporary Controls, namely: the Office of War Mobilization and Reconversion, the Office of Economic Stabilization, the Office of Price Administration, and the Civilian Production Administration. Consistent with applicable law, the Office of Temporary Controls shall be organized and its functions shall be administered in such manner as the head thereof may deem desirable.

2. There shall be at the head of the Office of Temporary Controls a Temporary Controls Administrator, hereafter referred to as the Administrator, who shall be appointed by the President and who shall receive a salary at the rate of $12,000 per annum unless the congress shall otherwise provide. Except as otherwise provided in this order, the functions of the Director of War Mobilization and Reconversion, the Economic Stabilization Director, the Price Administrator, and the Civilian Production Administrator, including such functions of the President as are now administered by the said officers, are vested in the Administrator. The functions hereby vested in the Administrator shall be deemed to include the authority to maintain in his own name civil proceedings relating to matters heretofore under the jurisdiction of the price administrator (including any such proceedings now pending)."

APPENDIX C.

Section 201(a) and 201(b) of the Emergency Price Control Act of 1942 (USCA Title 50, Appendix 901-946 Jan. 30, 1942, c. 26, 56 Stat. 23, provides as follows:

Sec. 201. (a) There is hereby created an Office of Price Administration, which shall be under the direction of a Price Administrator (referred to in this Act as the "Administrator"). The Administrator shall be appointed by the President, by and with the advice and consent of the Senate, and shall receive compensation at the rate of $12,000 per annum. The Administrator may, subject to the civil-service laws, appoint such employees as he deems necessary in order to carry out his functions and duties under this Act, and shall fix their compensation in accordance with the Classification Act of 1923, as amended. The Administrator may utilize the services of Federal, State, and local agencies and may utilize and establish such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may appear for and represent the Administrator in any case in any court. In the appointment, selection, classification, and promotion of officers and employees of the Office of Price Administration, no political test or qualification shall be permitted or given consideration, but all such appointments and promotions shall be given and made on the basis of merit and efficiency.

(b) The principal office of the Administrator shall be in the District of Columbia, but he or any duly authorized representative may exercise any or all of his powers in any place. The President is authorized to transfer any of the powers and functions conferred by this Act upon the Office of Price Administration with respect to a particular commodity or commodities to any other department or agency of the Government having other functions relating to such commodity or

commodities, and to transfer to the Office of Price Administration any of the powers and functions relating to priorities or rationing conferred by law upon any other department or agency of the Government with respect to any particular commodity or commodities; but, notwithstanding any provision of this or any other law, no powers or functions conferred by law upon the Secretary of Agriculture shall be transferred to the Office of Price Administration or to the Administrator, and no powers or functions conferred by law upon any other department or agency of the Government with respect to any agricultural commodity, except powers and functions relating to priorities or rationing, shall be so transferred.

APPENDIX D.

Title I of the First War Powers Act, 1941 (USCA Title 50 App.) Sec. 601, 602, 603, 604 are as follows:

"TITLE I—COORDINATION OF EXECUTIVE BUREAUS IN THE INTEREST OF THE MORE EFFICIENT CONCENTRATION OF THE GOVERNMENT

"§ 601. Coordination of executive bureaus, offices, etc., by President for national defense and to prosecute the war; issuance of regulations

"For the national security and defense, for the successful prosecution of the war, for the support and maintenance of the Army and Navy, for the better utilization of resources and industries, and for the more effective exercise and more efficient administration by the President of his powers as Commander in Chief of the Army and Navy, the President is hereby authorized to make such redistribution of functions among executive agencies as he may deem necessary, including any functions, duties, and powers hitherto by law conferred upon any executive department, commission, bureau, agency, governmental corporation, office, or officer, in such manner as in his judgment shall

seem best fitted to carry out the purposes of this title, and to this end is authorized to make such regulations and to issue such orders as he may deem necessary, * * *. *Provided further,* That the authority by this title granted shall be exercised only in matters relating to the conduct of the present war."

"§ 602. Same; consolidation of offices; transfer of duties, personnel and records

In carrying out the purposes of this title the President is authorized to utilize, coordinate, or consolidate any executive or administrative commissions, bureaus, agencies, governmental corporations, offices, or officers *now existing by law,* to transfer any duties or powers from one *existing* department, commission, bureau, agency, governmental corporation, office, or officer to another, to transfer the personnel thereof or any part of it either by detail or assignment, together with the whole or any part of the records and public property belonging thereto."

* * * * *

"§ 604. Presidential recommendation to Congress for elimination of certain bureaus, offices, etc.

Should the President, in redistributing the functions among the executive agencies as provided in this title conclude that any bureau should be abolished and it or their duties and functions conferred upon some other department or bureau or eliminated entirely, he shall report his conclusions to Congress with such recommendations as he may deem proper. Dec. 18, 1941, c. 593, Title I, § 4, 55 Stat. 839."